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ANDRE MCCARTER  
5333 BALBOA BLVD #127  
ENCINO CA 91316

**MAILED**  
**APR 13 2011**  
**OFFICE OF PETITIONS**

In re Patent No. 6,049,910 :  
Issue Date: April 18, 2000 :  
Application No. 09/294,528 : DECISION ON PETITION  
Filed: April 19, 1999 :  
Title: Athletic Training Glove :  
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This is a decision on the petition to accept the unavoidably delayed payment of the maintenance fee under 37 CFR 1.378(b), filed February 28, 2011.

The petition is **DISMISSED**.

The above-identified patent issued on April 18, 2000. Therefore, the window for paying the second maintenance fee extended from April 18, 2007 to October 18, 2007 without surcharge, and from October 19, 2007 to April 18, 2008, with surcharge. No maintenance fee and surcharge having been received in full on or before April 18, 2008, the patent expired on April 19, 2008. Patentee filed a petition under 37 CFR 1.377 on June 8, 2008, explaining that he did timely file the maintenance fee on April 16, 2008, but that it was \$30 deficient. The petition was dismissed in a decision mailed on March 20, 2009, explaining that patentee did not submit the \$200 fee required for the petition, and also explaining that a petition under 37 CFR 1.377 would need to demonstrated that the maintenance fee was timely paid **in full**. The two year deadline for filing a petition to accept the unintentionally delayed payment of the maintenance fee expired on April 18, 2010. Patentee filed a letter on April 15, 2010,

requesting a "grace period" to allow him to file a petition to accept the unintentionally delayed payment of the maintenance fee beyond two years after expiration. However, as the two year deadline is set by statute, it can not be waived. Accordingly, patentee's request was dismissed in a decision mailed on July 19, 2010.

**Relevant Statutes and Regulations**

35 U.S.C. § 41(c)(1) states that:

The Commissioner may accept the delayed payment of any maintenance fee required ... after the six month grace period if the delay is shown to the satisfaction of the Commissioner to have been unavoidable.

37 CFR 1.378(b) provides that:

Any petition to accept an unavoidably delayed payment of a maintenance fee must include:

- (1) The required maintenance fee set forth in §1.20(e) through (g);
- (2) The surcharge set forth in §1.20(i)(1); and
- (3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

§ 1.378(b)(3) is at issue in this case. Acceptance of a late maintenance fee under the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 35 U.S.C. § 133. This is a very stringent standard. Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful

men in relation to their most important business. In addition, decisions are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith, 671 F.2d at 538, 213 U.S.P.Q. at 982. Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines, 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32 (N.D. Ind. 1987).

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.

35 U.S.C. § 41(c)(1) does not require an affirmative finding that the delay was avoidable, but only an explanation as to why the petitioner has failed to carry his or her burden to establish that the delay was unavoidable. Cf. Commissariat A. L'Energie Atomique v. Watson, 274 F.2d 594, 597, 124 USPQ 126, 128 (D.C. Cir. 1960) (35 U.S.C. § 133 does not require the Commissioner to affirmatively find that the delay was avoidable, but only to explain why the applicant's petition was unavailing). Petitioner is reminded that it is the patentee's burden under the statutes and regulations to make a showing to the satisfaction of the Commissioner that the delay in payment of a maintenance fee is unavoidable. See Rydeen v. Quigg, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990), aff'd 937 F.2d 623 (Fed. Cir. 1991), cert. denied, 502 U.S. 1075 (1992); Ray v. Lehman, 55 F. 3d 606, 608 - 609, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995).

### **Analysis**

Petitioner has not demonstrated unavoidable delay within the meaning of 35 U.S.C. §41(c)(1) and 37 CFR 1.378(b).

Petitioner states that his late payment was unavoidable due to "injury disability and loss of work" prior to April 18, 2008, and being in "financial recovery mode" from 2008 into 2011.

When a petitioner asserts financial hardship, the Office needs to see copies of any bank records, tax returns, and W-2 forms for the period in question.<sup>1</sup> Here, the period in question is from the date the patent expired, April 19, 2008, up until the filing date of the instant petition, February 28, 2011. In addition,

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<sup>1</sup> Petitioner is encouraged to redact any identifying information he would wish to remain confidential - social security number, bank account numbers, etc.

the Office requests that petitioner provide an accounting of his expenses throughout the period.

Furthermore, there is a discrepancy in the record. The record discloses that petitioner submitted a maintenance fee payment of \$1,180, that was \$30 short of the \$1,210 due at the time, on April 16, 2008. Now petitioner is asserting that due to financial hardship, he was unavoidably prevented from paying the maintenance fee on or before April 18, 2008. It is not clear then how petitioner was able to pay \$1,180 on April 16, 2008. Rather, it appears that petitioner made an unintentional mistake in not paying the correct maintenance fee amount on April 16, 2008. Petitioner would need to overcome this discrepancy to support a showing of unavoidable delay.

### **Conclusion**

Any request for reconsideration of this decision must be filed within **TWO MONTHS** of the mailing date of this decision. Any such petition for reconsideration must be accompanied by the \$400 petition fee set forth in § 1.17(f). After decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Commissioner. Accordingly, on request for reconsideration, it is extremely important that petitioner supply any and all relevant information and documentation in order to meet his burden of showing unavoidable delay. This includes statements by all persons with direct knowledge of the cause of the delay, setting forth the facts as they know them.

If on request for reconsideration, the delayed payment of the maintenance fee is not accepted, then the \$1240 maintenance fee and the \$200 surcharge set forth in §1.20(i) are subject to refund following the decision on the petition for reconsideration, or after the expiration of the time for filing such a petition for reconsideration, if none is filed.


(Petitioner may request a refund of the maintenance fee and surcharge by writing to the Mail Stop 16, Director of the USPTO, P.O. Box 1450, Alexandria VA 22313-1450). A copy of the last decision rendered should accompany the request for refund).

Further correspondence with respect to this matter should be addressed as follows:

By mail:           Mail Stop Petitions  
                    Commissioner for Patents  
                    P.O. Box 1450  
                    Alexandria VA 22313-1450

By FAX: (571)273-8300  
Attn: Office of Petitions

Telephone inquiries concerning this communication should be directed to the undersigned at 571-272-3207.

A handwritten signature in black ink, appearing to read "Cliff Congo".

Cliff Congo  
Petitions Attorney  
Office of Petitions